Office - Supreme Court, U. S.
FILED
SEP 12 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

NUMBER 608

MILTON H. FRIEND, BERTHA F. LEVY AND ETHEL PACYNA, AS TRUSTEES OF THE TRUST ESTATE CREATED UNDER THE LAST WILL AND TESTAMENT OF HENRY FRIEND, DECEASED,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A. J. PFLAUM,
HARRY N. WYATT,
Counsel for Petitioners.
33 North La Salle Street,
Chicago, Illinois.

Of Counsel:
D'ANCONA, PFLAUM, WYATT, MARWICK & RISKIND,
33 North La Salle Street,
Chicago, Illinois.

THE DONNELLEY-LAKESIDE PRINTING COMPANY, 350 WEST MADISON, CHICAGO

INDEX.

PAGE

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit 1
Jurisdiction 1
Questions Presented 2
Statement of the Matter Involved 3
Reasons for Allowance of the Writ 4

Brief in Support of Petition 6
Opinions Below 6
Statement of Jurisdiction 6
Statement of the Case 6
Specification of Errors to be Urged 6

Argument:
The Basis for Depreciation or Return of Capital of Exhaustible Property Acquired by a Decedent's Estate from the Decedent Is Its Value on the Date of Decedent's Death 7

Conclusion 19

Appendix 23

Table of Cases Cited.

Burnet v. Hanlon, 51 F. (2d) 463, 465, 10 A. F. T. R. 267 (C. C. A. 4th 1931) 4, 18-19

Burnet v. Logan, 283 U. S. 404, 413-414, 75 L. Ed. 1143 (1931) 4, 14-15, 18

Commissioner v. Dobbins, 72 F. (2d) 984, 985, 14 A. F. T. R. 8645 (C. C. A. 3rd 1929) 4, 17

Dobbins v. Commissioner, 31 F. (2d) 935, 936, 7 A. F. T. R. 8645 (C. C. A. 3rd 1929) 4, 15-16

Hartley v. Commissioner, 295 U. S. 216, 79 L. Ed. 1399 (1935), affirming 72 F. (2d) 352, 353, 356, 14 A. F. T. R. 444 (C. C. A. 8th 1934) 4, 11-13

McCahill v. Helvering, 75 F. (2d) 725, 15 A. F. T. R. 304 (C. C. A. 8th 1935) 4, 17-18

Peak v. Commissioner, 80 F. (2d) 761, 17 A. F. T. R. 117 (C. C. A. 8th 1936) 4, 18

Rose v. Grant, 39 F. (2d) 338, 339-40, 8 A. F. T. R. 10494 (C. C. A. 5th 1930) 4, 17

Constitution of the United States.

Sixteenth Amendment 20

Statutes Cited.

Judicial Code, Section 240(a) 1, 6

Revenue Act of 1934:

Section 22(b)(3) 2, 13, 14

Section 23(l) 2, 7, 14

Section 23(n) 2, 7

Section 113 ..... 2, 8, 17, 23-28

Section 113(a)(4) 19

Section 113(a)(5) 6, 8, 9, 10, 13, 14, 19

Section 113(b) 8
Section 114 .....2, 10, 28
Section 114(a) 3, 6, 8, 14, 17, 19
Section 114(b) 17

Miscellaneous:
Treasury Regulations 86, Art. 114-1..... 8
Report of Ways and Means Committee of the House of Representatives on the Revenue Act of 1924 (68th Cong., 1st Sess., H. Rept. 179, 1939—1 C. B. (Part 2) 254).....9, 13
Report of Ways and Means Committee of the House of Representatives on the Revenue Act of 1934 (73rd Cong., 2d Sess., H. Rept. 704, 1939—1 C. B. (Part 2) 575) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

NUMBER .....

MILTON H. FRIEND, BERTHA F. LEVY AND ETHEL PACYNA, AS TRUSTEES OF THE TRUST ESTATE CREATED UNDER THE LAST WILL AND TESTAMENT OF HENRY FRIEND, DECEASED,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Milton H. Friend, Bertha F. Levy and Ethel Pacyna, as Trustees of the Trust Estate created under the Last Will and Testament of Henry Friend, Deceased, by A. J. Pflaum and Harry N. Wyatt, their counsel, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the above case.

Jurisdiction.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938; 28 U. S. C. A. § 347.

The judgment herein sought to be reviewed is a decision of the United States Circuit Court of Appeals for the Seventh Circuit, entered February 26, 1941 (R. 216-17). A petition for rehearing was denied June 13, 1941 (R. 217).

Questions Presented.

1. Does the Revenue Act of 1934 provide a basis for depreciation of property acquired by bequest, devise or inheritance or by the decedent's estate from the decedent?

2. The executors of the Will of Henry Friend, deceased, acquired from said Henry Friend upon his death the lessor's interests in certain long term leases covering land and buildings in Chicago. These leases provided for fixed annual rentals substantially in excess of the fair rental value of the land at the time of the decedent's death, and for that reason the lessor's interests in the leases had a fair market value at that time substantially in excess of the fair market value of the unencumbered fee simple in the land. Respondent admitted at the hearing that, if the executors had purchased said lessor's interests at their then fair market value, such excess would be an exhaustible capital asset, returnable (free from income tax) by annual deductions spread over the terms of the leases, and that the only question in this case is whether or not, under the applicable revenue act, such excess values of the leaseholds, when acquired by inheritance, have a basis for depreciation or for exclusion from income as return of capital, equivalent to that in the case of purchase. Under these circumstances do §§ 22, 23, 113 and 114 of the Revenue Act of 1934 provide a basis for depreciation or return of capital equal to the excess value of the lessor's interests in such leaseholds over the unencumbered land on the date of the decedent's death?

Statement of the Matter Involved.

On August 1, 1932, when Henry Friend died, he was the owner of the fee in two certain pieces of real estate in Chicago, namely, 6308-10 and 6312-14 South Halsted Street, and also of the lessor's interests under leases of those properties, the former for approximately 87 years with S. S. Kresge Company and the latter approximately 41 years with F. W. Woolworth Co. The rentals provided in these leases being substantially higher than the current rental value of the land on August 1, 1932, the fair market value of the fees plus the lessor's rights to rents under the leases, received by the decedent's estate from the decedent, was substantially greater than the fair market value of the land alone.

The executors of the decedent's estate claimed the right to take annual deductions from the gross income of these properties (for convenience collectively referred to as the "Halsted properties") for income tax purposes, as depreciation, amortization or exhaustion of these excess values. These deductions were disallowed by the respondent for the calendar years 1934 and 1935, and the Commissioner's disallowance has been affirmed by the United States Board of Tax Appeals and the United States Circuit Court of Appeals for the Seventh Circuit.

The opinion of the Circuit Court of Appeals relies in its affirmance of the disallowance upon the fact that the executors did not have a "cost" for these excess values—did not pay out a valuable consideration therefor,—thus differentiating property acquired by inheritance from that acquired by purchase. In addition, the Circuit Court of Appeals (overlooking entirely Section 114 (a) of the Revenue Act of 1934) ruled that property acquired by inheritance had a basis solely for the purpose of determining *gain or loss* for income tax purposes in the event of a future sale, and not for *depreciation*.

Reasons for Allowance of the Writ.

This writ is sought on the ground that: The Circuit Court of Appeals erred in deciding that exhaustible property acquired by a decedent's estate from the decedent does not have a basis for depreciation by reason of such acquisition under the Revenue Act of 1934, and that the proceeds from such exhaustible property constitute income to the decedent's estate when received without exclusion or deduction of the value thereof on the date of the decedent's death as return of capital or as depreciation, amortization or exhaustion. This is a decision of a Federal question in conflict with the applicable decisions of this Court, and in conflict with the decisions of at least four other Circuit Courts of Appeals, and is contrary to the unmistakable language of the revenue laws and rules and regulations thereunder.

Hartley v. *Commissioner,* 295 U. S. 216, 79 L. Ed. 1399 (1935), affirming 72 F. (2d) 352, 353, 356, 14 A. F. T. R. 444 (C. C. A. 8th 1934).

Burnet v. *Logan,* 283 U. S. 404, 413-414, 75 L. Ed. 1143 (1931).

Commissioner v. *Dobbins,* 72 F. (2d) 984, 985, 14 A. F. T. R. 545 (C. C. A. 3rd 1934).

Dobbins v. *Commissioner,* 31 F. (2d) 935, 936, 7 A. F. T. R. 8645 (C. C. A. 3rd 1929).

Rose v. *Grant,* 39 F. (2d) 338, 339-40, 8 A. F. T. R. 10494 (C. C. A. 5th 1930).

Peak v. *Commissioner,* 80 F. (2d) 761, 17 A. F. T. R. 117 (C. C. A. 8th 1936).

McCahill v. *Helvering,* 75 F. (2d) 725, 15 A. F. T. R. 304 (C. C. A. 8th 1935).

Burnet v. *Hanlon,* 51 F. (2d) 463, 465, 10 A. F. T. R. 267 (C. C. A. 4th 1931).

This reason is further and more fully developed in the brief in support hereof, annexed hereto.

All of which is respectfully submitted.

A. J. Pflaum,
Harry N. Wyatt,
Counsel for Petitioners.
33 North La Salle Street,
Chicago, Illinois.

Of Counsel:
D'Ancona, Pflaum, Wyatt, Marwick & Riskind,
33 North La Salle Street,
Chicago, Illinois.